

Comment Response Document
Peabody Western Coal Company - Black Mesa Complex
NPDES Permit No. NN0022179
August 3, 2009

COMMENT: Request for Public Hearing

Pursuant to 40 C.F.R. §124.12, Commenters respectfully request a public hearing be held within sixty (60) days of receipt of this letter to address the very serious and substantial issues and concerns raised herein. The public hearing should be held in Kayenta, Arizona.

Many of the people directly impacted by EPA's permit issuance are Navajo and Hopi tribal members who, if they speak English at all, speak English primarily as a second language. Many Native American communities in the Black Mesa area bear a disproportionate share of Peabody's ongoing discharge of numerous pollutants onto tribal lands. These communities often lack the political agency and economic leverage required for effective participation in environmental decision-making processes. Further, EPA owes a trust obligation to indigenous people and therefore needs to ensure that tribal people and lands are not being disproportionately impacted by Peabody's massive mining operation and ongoing discharge of pollutants.

At the public hearing, we respectfully request that the agency make available in a culturally sensitive format and for public review and consumption: (1) copies of the proposed NPDES permit; (2) a 2-3 page fact sheet or executive summary; (3) Peabody's application and all other related material; (4) copies of any and all relevant National Environmental Policy Act ("NEPA") documentation for this proposal; (4) detailed --and large size-- maps of the area and the discharges covered by the permit; (5) any other relevant information that, in particular, discusses Peabody's current violations of Water Quality Standards ("WQS") and any "compliance schedule" being proposed by EPA to rectify such violations. Commenters respectfully request that, in addition to allowing public comment, EPA provide a detailed presentation using an interpreter as well as answer any questions put to the agency by members of the public.

Commenters also request a site visit of the outfalls (and in particular the J-7 dam and BMA-1) the day prior to the public hearing as well as the ability to conduct grab samples of any discharges.

Notice of EPA's public hearing should be provided at least 30-days in advance and published in tribal newspapers and announced on tribal radio. Additionally, EPA should directly contact impacted tribal members including, but not limited to, tribal members who hold grazing permits in areas affected by Peabody's outfalls. The Administrative Record suggests that multiple sites (some of which are highly contaminated) are currently being used for livestock watering. Lastly, the U.S. Army Corp of Engineers, the Federal Office of Surface Mining Control and Enforcement and U.S. Fish and Wildlife Service staff should be present at the hearing to answer any related questions.

RESPONSE: EPA has decided not to hold a public hearing. EPA has received only one comment requesting a hearing on the proposed permit, from the Energy Minerals Law Center, located in Durango, Colorado. EPA has not received any other requests to hold a public hearing. EPA has the discretion to hold a public hearing if the Director finds, on the basis of requests, a significant degree of public interest. [40 CFR 124.12].

EPA notes that numerous public hearings were held as part of the EIS conducted for the Life of Mine permit revision application to the Office of Surface Mining

Reclamation and Enforcement (OSMRE) which afforded the public opportunity to comment on many of the issues raised for the community as part of the mine site. EPA was present at several of the scoping meetings and public hearings in order to receive comments from the public related to water quality issues. EPA was present at the meetings held during the second week of January, 2005 in Kayenta, Second Mesa, and Leupp, Arizona. Additionally, EPA was present at the following meetings held during the first week of January, 2007 in Moenkopi, Kayenta, and Kykotsmovi, Arizona. The only comment received at these meetings related to water was from several downstream landowners who objected to the presence of the stormwater holding ponds at the mine site because they felt the ponds were withholding valuable water from downstream users. As noted in the fact sheet, EPA is implementing the new Subpart H requirements which will allow PWCC to remove many ponds from the site. EPA received no comments nor was any interest expressed related to water quality issues from the mine site.

COMMENT: Remedying Violations of WQS Standards

Much of the limited background information contained in EPA's Administrative Record indicates a significant water quality problem at the Black Mesa Complex. Commenters respectfully assert that EPA's renewal permit (as currently proposed) would exacerbate the problem by authorizing Peabody to continue its unabated discharge of, in some instances, highly contaminated wastewater from over 110 outfalls—while directing Peabody to seek a “variance” to deal with ongoing exceedances of applicable WQS.

Commenters believe that EPA's approach to dealing with Peabody's ongoing violations of the Clean Water Act (“CWA”) is flawed and that a fundamentally different approach needs to be immediately employed by the agency to deal with this very serious situation.

RESPONSE: The Administrative Record does not demonstrate significant water quality problems at the Black Mesa Complex. As indicated in the Fact Sheet, the permit authorizes the discharge of mine drainage stormwater at over 100 Outfall locations which drain areas of the mine site defined as “Alkaline Mine Drainage”, “Western Alkaline Reclamation Areas” and “Coal Preparation and Associated Areas”. No water quality problems have been identified from the discharge of mine drainage from authorized Outfalls. The commenter may be conflating perceived issues at the seeps with the 100 stormwater outfalls authorized by the permit.

All stormwater generated at the mine site is subject to NPDES permitting requirements and is treated in pond impoundments prior to discharge. At the impoundments, collected and stored stormwater may infiltrate into the soil. At several impoundments, depending on the location of the impoundment and the geologic formations beneath them, water that has seeped into the soils may re-emerge below the impoundment structure. EPA observed these seeps on a compliance inspection, and required Peabody Western Coal Company (PWCC) to monitor and characterize these seeps in the previous permit (issued December 2000). In response, PWCC submitted an “Interim Final Report” (“Report”) on April 1, 2008 which summarized the data collected at each of the seeps, including a description of the following information:

- Number of seep inspections;
- Number of flows observed;
- Range of flows observed;
- Number of samples taken;
- Exceedances of Livestock standards;
- Exceedances of acute standards, exceedances of chronic standards;
- Current use of pond (e.g., outfall location, internal pond, treatment for reclaimed water, active, shop areas, etc.);
- Final use of pond, including an estimation if pond can be removed;
- Best Management Practices (“BMPs”) utilized (e.g., vegetation, fencing, dewatering);
- Potential BMPs to be evaluated (e.g., pond removal, vegetation, passive pH treatment, clay lining, dewatering, other);

PWCC has characterized both the water quality of the impoundments and the water quality of the seeps as part of the report. Based on a comparison of the analysis, it was concluded that many pollutant levels found at the seep locations were caused by the seepage activity itself (during which stormwater infiltrates certain soil layers below the impoundment ponds and leaches pollutants found in the soil layers) and not from mining activities.

Therefore, the characterization of the seeps must be considered separate from the characterization of both the authorized Outfalls and the characterization of the stormwater contained in the ponds. Seep identification and characterization has demonstrated that several seeps have shown concentrations of pollutants above water quality standards. However, these issues are strictly related to the seeps, which are small in number, low in flows, and may not result in a discharge to a Water of the U.S. A complete analysis of these seeps was provided in the fact sheet.

As stated in the Fact Sheet, EPA has required PWCC to monitor all 230 impoundments on the Black Mesa Complex, many of which are internal impoundments for treatment and storage and which do not discharge to a water of the U.S. There are currently 111 ponds that discharge to Waters of the U.S. and which are therefore listed as NPDES outfalls in this permit. EPA has instructed PWCC to monitor all seeps located within 100 feet of an impoundment. Many of the seeps are simply moist areas which do not generate actual flow volumes. Additionally, many other seeps are located on the toes of the impoundments and do not discharge to a Water of the U.S., or may be located at internal impoundments which do not discharge to a Water of the U.S.

Regardless of the cause of the pollutant concentrations documented in Section VI of the Fact Sheet, and regardless of whether the seep is or is not considered a discharge to a Water of U.S., EPA has required PWCC to implement the Seep Management Plan at all impoundments at the mine site in order to characterize and implement corrective actions to control all seeps. Therefore, EPA believes that this is the most comprehensive and effective approach to monitor seeps to prevent even the potential for water quality problems, and to provide for corrective actions and the installation of Best Management

Practices at those seeps which have been identified with the potential to cause water quality problems. This approach is being pursued regardless of whether the seeps have the potential to discharge to a Water of the U.S. EPA believes the conditions in the permit are effective for the monitoring and control of seeps.

See next response for response to this comment as it pertains to variances.

COMMENT: Variances Inappropriate

EPA provides no discussion or legitimate basis for the proposed use of “variances.” See, EPA’s “Fact Sheet.” See e.g., 40 C.F.R. §124.8(5) (requiring EPA to “justify” use of variances). In particular, EPA provides no discussion or analysis of “the economic and social costs and the benefits to be obtained” from allowing Peabody to evade compliance with (even temporarily) applicable WQS. 33 U.S.C. §1312(b)(2).

While nowhere defined in EPA’s permit materials or Administrative Record, Commenters understand EPA’s proposed “variance” to mean a period of time where water quality effluent limits would not apply to Peabody.

According to Peabody’s website, “Peabody Energy (NYSE: BTU) is the world’s largest private sector coal company, with 2008 sales of 256 million tons and \$6.6 billion in revenues.” Peabody recently reported record revenues.

Commenters expect EPA, consistent with the requirements of the CWA, to hold Peabody to the highest of standards and order to exercise the “maximum degree of control” of its discharge of pollutants. 33 U.S.C. §1312(b)(2). Achievement of WQS is achievable both from a technological and financial perspective as Peabody is clearly in a financial position to implement technological-based pollution controls that eliminate discharges (e.g. temporary/permanent wastewater treatment facilities, liners, etc.).

That said and instead of recommending that Peabody seek “variances” from WQS to deal with its ongoing Clean Water Act violations (presumably from the Navajo Nation), EPA should immediately issue a “compliance order” within the next 30 days. 33 U.S.C. §1319 (dealing with “compliance orders”); see also, 40 C.F.R. §131.12 (outlining EPA’s antidegradation policy).

RESPONSE: The reissued permit does not allow for, nor does it authorize, any variances at the Black Mesa Mine Site. No variances were proposed nor considered in the draft permit. Therefore, EPA has not provided a discussion of the basis for a water quality variance.

As indicated in the fact sheet (Part VI Special Conditions- Seep Monitoring and Management Plan), EPA and PWCC established a prioritization to address seeps, including 1) reclaim as many ponds as possible 2) eliminate monitoring requirements for seeps not causing problems 3) continue monitoring where data is inconclusive 4) establish a permanent fix for problem areas and 5) explore if regulatory variances may be applicable for certain non-bioaccumulative parameters.

EPA notes that a regulatory variance may be allowed as specified under 40 CFR 131.10(g) if certain conditions are met, including the presence of naturally occurring pollutant concentrations. EPA has made no determination at this time if a variance may

be appropriate for the circumstances at the mine site, and PWCC has not indicated an intention to apply for a regulatory variance at this time. EPA has merely stated in the fact sheet as part of its recommended seep management approach, that a variance may be considered as a last priority in certain circumstances. Hence, EPA stated that it may be appropriate to "...explore if a regulatory variance may be applicable..."

Moreover, before EPA could consider making a permit less stringent on the basis of a variance from a water quality standard, the variance would need to be adopted by the Navajo Nation and/or Hopi Tribe and approved by EPA in accordance with Section 303 (c) of the CWA. Any variance would need to be adopted following the procedures for changing water quality standards, including public participation. Likewise, any permit modification incorporating a variance would be subject to a public comment period.

COMMENT: Compliance Order Requested

In particular, a compliance order should be issued for ponds BM-A1, J3-D, J-7A, J7-CD, J7- Dam, J7-JR, J16-A, J16-E, J19-D, J21-C, J27-A, J27-RC, N6-C, N6-F, N14-B, N14-H, N14-P, WW-9. According to EPA's "fact sheet," discharges from all of these ponds are currently noncompliant with one or more WQS. EPA's compliance order should establish a wastewater treatment process for each discharge point as well as a timeframe for compliance with WQS. Commenters believe 60-days is a sufficient time for Peabody to take any necessary corrective action to halt violations of the CWA.

RESPONSE: The commenters' request to issue a compliance order to PWCC is a separate matter from the effluent limitations, monitoring requirements, and special conditions contained in the reissued NPDES permit. EPA believes the continued implementation of the Seep Management Plan is the most comprehensive approach to address seeps. No changes to the permit appear necessary to address comment.

COMMENT: Enforcement Action Requested

Additionally, and according to the Final Environmental Impact Statement ("FEIS") for the Black Mesa Complex and prepared by the URS Corporation, at least two ponds, J-21A1 and N14-P-S1 which are violating WQS do not appear to be covered by Peabody's current NPDES permit. FEIS at 3-27. That said EPA needs to take immediate (and similar) enforcement actions to halt these unpermitted discharges.

RESPONSE: These ponds and the seeps from these ponds do not discharge to a Water of the U.S. and are therefore not regulated as an NPDES Outfall. (*see discussion above regarding seeps*). As stated in the fact sheet (Section VI), there are over 230 impoundments on the Black Mesa Complex, many are internal impoundments for treatment and storage and which do not discharge to a water of the U.S. The ponds referenced by the commenter are internal impoundments used to treat stormwater runoff at locations within the mine site, which may be located miles away from a discharge location. Although these impoundments do not discharge to a Water of the U.S. and are not subject to NPDES permitting requirements, EPA is requiring PWCC to sample,

characterize, and install corrective actions for all seeps identified at the mine site, which includes seeps that may not be subject to NPDES permitting regulations.

COMMENT: Monitoring and Sampling Requested

EPA itself should monitor and sample discharges from the outfalls listed above to ensure compliance with WQS and ground-truth any argument (expected from Peabody) that certain exceedances of WQS somehow constitute “background levels” or are attributable to “natural processes”-- a claim that is not substantiated by any independent agency review or analysis in the Administrative Record.

RESPONSE: EPA has not made any determinations for the permit renewal that the characterization data of the seeps represents natural background levels, or that a variance would be appropriate. As noted above, the renewed permit does not contain any variances nor effluent limitations based on variances. Additional studies and sampling may be necessary to justify any variance request, if such a request is made. The commenters’ request for EPA to conduct its own monitoring is a separate matter from the effluent limitations, monitoring requirements, and special conditions contained in the reissued NPDES permit.

COMMENT: Construction of Wastewater Treatment Facility Requested

Commenters recognize that in at least two situations (Ponds J-7 and BMA-1), and while temporary and immediate cleanup measures are necessary, a permanent wastewater treatment facility will need to be constructed by Peabody. This should be expressly accounted for in any compliance order. Establishment of a permanent wastewater treatment facility is certainly within the “economic capability” of Peabody. 33 U.S.C. §1312(b)(2).

RESPONSE: As EPA stated in the Fact Sheet, EPA believes that the first priority to address seeps is to reclaim the impoundments, which would eliminate associated seeps entirely. In certain cases, the impoundment ponds are necessary either on a temporary basis (for treatment of active mining areas) or on a permanent basis (for livestock watering as determined by the property owner). In the table in Section VI of the Fact Sheet, EPA has noted the pond condition as temporary or permanent and the rationale for this categorization. If the pond cannot be reclaimed, the treatment options for the seeps depend up the characterization of the pond (temporary or permanent treatment) and the pollutants that are present in the seep. EPA believes the continued implementation of the Seep Management Plan is the most comprehensive approach to address seeps.

Moreover, issuance of a compliance order is not a mandatory act, but within the enforcement discretion of the EPA. Issues related to EPA’s enforcement of the effluent limitations, monitoring requirements, and special conditions contained in the NPDES permit are subject to EPA enforcement policy and are not a consideration for EPA’s establishment of the NPDES permit conditions. The comments pertaining to enforcement have been forwarded to the appropriate compliance and enforcement staff for their consideration.

COMMENT: Rejection of Potential Remediation Proposals

Additionally, Commenters affirmatively state their opposition to any Peabody proposal to dewater contaminated ponds and use the water for “dust control.” This is not a viable solution and poses significant environmental health and safety issues. Any such remediation proposals by Peabody should be rejected by EPA.

RESPONSE: The permit does not authorize nor prevent the use of pond water for dust control, because dust control does not result in a discharge to a Water of the U.S. in this case. As noted above, the commenter confuses the water quality characterization of the seeps with the water quality characterization of the impoundment ponds. There is no evidence that the water collected in the impoundments would pose any environmental health or safety issues, as the water only fails to meet water quality standards after it has flowed through the ground and resurfaced at the seeps. Dust control is a necessary activity for mining to limit unwanted air quality effects, and EPA generally encourages the re-use of stormwater on-site for this purpose rather than the use of fresh sources of water. The utilization of stormwater collected from the mine site and placed back into the mine area to control dust is not prohibited by the NPDES permit. No changes have been made to the reissued permit in response to this comment.

Comment: Independent Review of Outfalls

Because of the significant number of violations of WQS already occurring at Peabody's Black Mesa Complex and because of the large number of discharges being covered by EPA's NPDES permit (over 100 outfalls), EPA needs to conduct its own independent review of all outfalls in the Black Mesa Complex to ensure compliance with WQS and existing permit conditions.

The administrative record suggests that EPA has conducted one (1) site visit over the last ten years and that the agency's visit may have been limited to two ponds. One site visit does not constitute meaningful regulatory oversight of this operation. This is especially true where, as here, there are over 230 impoundments on the Black Mesa Complex and where Peabody intends to make at least 51 impoundments permanent.

RESPONSE: While inspection frequency bears no relation to the effluent limits and performance standards found in the permit, EPA notes that several inspections and site visits have been conducted by U.S EPA during the life of the mine site, and numerous inspections have been conducted by both the Navajo Nation EPA and the Office of Surface Mining Reclamation and Enforcement. EPA routinely coordinates with these agencies to ensure the mine site is meeting environmental regulations.

Comment: Deletion of Outfalls

Further, Peabody is requesting “deletion” of outfalls covered under its current NPDES permit for ponds J16-I, J16-J, J16-K, J21-J, N2-G, N7-A1, N8-A, N8-B and N14-M and WW-9D. However, there is no indication from the Administrative Record that EPA or any other regulatory agency (e.g. Navajo Nation Environmental Protection Agency) has verified and confirmed the permanent elimination of discharge from these ponds. Deletion should not occur unless and until EPA has physically verified elimination of discharges from these outfalls.

RESPONSE: Due to the nature of coal mining, the pit where coal extraction is taking place is constantly moving. Therefore, PWCC is continuously updating its treatment plan, sediment control plan, opening new areas to mining, and reclaiming areas already mined. New ponds must be built to accommodate the new mined areas, and non-utilized ponds must be removed after mining and reclamation has been completed to minimize the risk of seeps and other effects. A pond may be deleted as an NPDES Outfall location when it is physically removed, or when a new pond is constructed downstream of the existing pond, and the Outfall location therefore moves to the pond located downstream. The locations of Outfalls and impoundment ponds were submitted as part of the NPDES permit re-application Form 2C. EPA has verified the deletion of the Outfall locations on topographical maps and through review of the Sediment Control Plan. Based on the detailed information submitted and the significant drain on limited agency resources that would come with inspecting the mine site after every pond change, EPA has concluded it is not appropriate to physically verify each change or deletion of ponds.

COMMENT: Design Parameters for 404 permit

Additionally, Peabody has now requested the addition of 16 ponds to be covered under the NPDES permit. Given the problems (and violations of WQS) at existing Peabody impoundments, EPA (in conjunction with the U.S. Army Corps of Engineers) should be establishing design parameters and any necessary wastewater treatment processes up front. Design parameters should be established during the 404 permitting process.

RESPONSE: As described immediately above, new ponds and Outfall locations must be constructed to accommodate new mining areas. As part of the continued implementation of the Seep Management Plan, all impoundments must be inspected regularly for seeps. If any seeps are identified, they must be characterized and managed to prevent exceedances of water quality standards. EPA believes the continued implementation of the Seep Management Plan is the most comprehensive approach to address any seeps that may result from sedimentation ponds. As indicated above, this permit is being issued under the authority of Section 402 of the CWA which requires that the discharge of any pollutant to a Water of the U.S. must be in compliance with a NPDES permit. The facility may also require authorization under a separate permit under the authority of Section 404 of the CWA for the discharge of fill material to a water of the U.S. While the requirements and design parameters that may be necessary to implement Section 404 of the CWA will be considered upon the issuance of a 404 permit, they are not a consideration for the issuance of the NPDES permit.

COMMENT: Peabody's Significant Permit Revision and EIS

EPA's proposed permit draft (1/20/08)" states that EPA is a cooperating agency in review of Peabody's Significant Permit Revision, Permit No. AZ-0001D, OSM Project No. AZ-0001-E-P-01 (SMCRA Permit Revision) and the production of the Environmental Impact Statement ("EIS") evaluating the establishment of the Black Mesa Complex.

That said EPA was under a duty to notify the Federal Office of Surface Mining, Control and Enforcement ("OSM") of Peabody's ongoing violation of the CWA and WQS. Additionally,

and because of these ongoing violations, EPA should have instructed OSM to deny Peabody's Significant Permit Revision, Permit No. AZ-0001D, OSM Project No. AZ-0001-E-P-01. It was unlawful for OSM (and EPA) to authorize a SMCRA Permit Revision where, as here, Peabody is not meeting water quality standards.

Additionally, and equally troubling, is the fact that the EIS prepared for Peabody's SMCRA Permit Revision (in both draft and final form) did not analyze or even mention Peabody's pending NPDES application with EPA. See e.g., 40 C.F.R. §124.61 According to EPA's "fact sheet", Peabody's NPDES renewal application was submitted to EPA in August of 2005 and was pending before the agency by February of 2006. The Draft EIS for Peabody's Black Mesa Complex was issued in November 2006. The Final EIS and Record of Decision ("ROD") was issued in November 2008. Thus, it appears that EPA and OSM unlawfully segmented the NPDES permit decision in violation of the National Environmental Policy Act ("NEPA"). See e.g., 40 C.F.R. §1508.25(a)(1).

Further, the EIS for the Black Mesa Complex omitted analysis of highly relevant information including, but not limited to, Final Reports on the Seepage Management Plan for NPDES Permit No. NN0022179 and submitted to EPA in April and May of 2008 and a Sediment Control Plan which was submitted to EPA in September 24, 2008.⁴ These records constitute significant new information none of which was analyzed in the EIS for the Black Mesa Complex. See e.g., 40 C.F.R. §1502.9(c).

At a minimum, OSM, EPA and U.S. Army Corp of Engineers need to prepare a new or supplemental EIS to analyze this information.

RESPONSE: EPA notes that all materials related to the NPDES permit, including the previous permit which included requirements for the Seep Management Plan, and the date of which PWCC submitted its NPDES permit re-application, are a matter of public record and have been available through EPA Region 9's website and the Permit Compliance System (PCS).

As described above, EPA was a cooperating Agency in the review of the SMCRA permit revision and EPA participated in the public review and comment process. No further analysis nor notification by EPA was required as part of the EIS process.

As indicated above, this permit is being issued under the authority of Section 402 of the CWA which requires that the discharge of any pollutant to a Water of the U.S. must obtain a NPDES permit. The facility has also obtained a SMCRA permit revision and prepared an EIS due to the Surface Mining Control and Reclamation Act which is a separate permit issued under separate regulatory authority than the NPDES permit. The SMCRA permit is not a consideration for the effluent limitations, monitoring conditions, and regulatory requirements contained in the NPDES permit. No changes to the permit appear necessary to address comment.

COMMENT: Other Issues

First, and as rightfully noted by EPA, there is no discussion in the EIS for the Black Mesa Complex or the Administrative Record for the NPDES permit of 404 permitting for the ponds and impoundments at Peabody's Black Mesa Complex. Because Peabody has now created over 230 impoundments on the Black Mesa Complex, this situation warrants intensive on-site investigation

by EPA. The Army Corp of Engineers, unlike EPA, was not made a cooperating agency in production of the EIS. 404 permitting should also be addressed in a new or supplemental EIS.

RESPONSE: This permit is being issued under the authority of Section 402 of the CWA which requires that the discharge of any pollutant to a Water of the U.S. must be in compliance with a NPDES permit. This permit does not authorize any activity regulated under Section 404 of the CWA which requires a separate permit.

COMMENT: Safe Drinking Water Act Applicability

Second, some of the data in the Administrative Record suggests that some of the “seeps” and discharges may be leeching into groundwater. EPA needs to analyze whether the Safe Drinking Water Act is implicated. This should be addressed in a new or supplemental EIS.

RESPONSE: This permit is being issued under the authority of Section 402 of the CWA which requires that the discharge of any pollutant to a Water of the U.S. must be in compliance with a NPDES permit. The CWA requires that effluent limitations must be placed in the permit to control all pollutants which have the reasonable potential to cause or contribute to an exceedance of water quality standards. The beneficial uses of the water quality standards, which may include drinking water beneficial use where applicable, have been evaluated in the fact sheet. The NPDES permit only authorizes discharges to surface waters of the U.S. and neither authorizes nor prevents discharges to groundwater, which may be regulated at the discretion of the Navajo Nation and the Hopi Tribe. The Safe Drinking Water Act is not related to the effluent limitations and performance standards contained in the permit. No changes to the permit appear necessary to address comment.

COMMENT: Navajo Nation Law Applicability

Third, and because of the Navajo Nation’s treatment as a state status, EPA needs to discuss the application of much more stringent Navajo Nation laws to Peabody’s operation. See, 4 N.N.C. §1301 et seq. (Navajo Nation Clean Water Act); 4 N.N.C. §§ 901, et seq. (Navajo Nation Environmental Protection Act) and Diné Bi Beenahaz’áanii (Diné Fundamental Law), 2 N.N.C. §§ 201-206. Navajo law would apply to all Navajo lands.

RESPONSE: EPA has coordinated extensively with the Navajo Nation EPA on the permit reissuance. The Navajo Nation has its own approved Water Quality Standards, and EPA is required to ensure that the permit reissuance is in compliance with Navajo Nation Standards. The Navajo Nation submitted a 401 Water Quality Standards Certification to USEPA on 2/25/09 stating the permit will comply with all appropriate requirements of Navajo Nation law.

COMMENT: Federal law on Hopi Land

As Hopi does not have treatment as state status, it is assumed that Federal law and EPA’s effluent limitations would apply by default.

RESPONSE: The Fact Sheet contained erroneous information regarding the status of the Hopi Tribe Water Quality Standards. The Hopi tribe recently received Treatment as a State Status and EPA has approved their 1999 Water Quality Standards. Therefore, the

Hopi Tribe submitted a 401 Water Quality Standards Certification to USEPA stating that the permit will comply with all appropriate requirements of the Hopi Tribe's Water Quality Standards. The language in the Fact Sheet has been corrected.

COMMENT: Sediment Control Plan Availability

The Sediment Control Plan (September 24, 2008) was not released as part of EPA's Administrative Record. Commenters reserve the right to supplement their comments once the plan has been made public.

RESPONSE: EPA provided the Sediment Control Plan to the commenter both via electronic format (on 3/10/09 via email) and also as hard copy (sent on 2/10/09 via regular mail), per the commenter's request to receive a copy of the Administrative Record. As noted in the Administrative Record documents, the Sediment Control Plan was sent directly to the commenter but did not include 4 large-format maps that could not be scanned/copied. All materials were publicly available as documented in the Public Notice.

COMMENT: Designation of Outfalls on Hopi vs. Navajo Land

Approximately 25,000 acres of land are held exclusively by the Navajo Nation. However, approximately 40,000 acres of land are located in the former Hopi and Navajo Joint Minerals Ownership Lease Area and the surface has been partitioned with 6,000 acres partitioned to Navajo and 34,000 partitioned to Hopi. That said Navajo law does not govern on Hopi lands. EPA needs to identify which outfalls may be subject to more stringent Navajo Nation laws and which are on Hopi lands and would be subject to EPA standards. This should be addressed in a new or supplemental EIS.

RESPONSE: As described above, a new or supplemental EIS is not needed. In addition, both Navajo and Hopi have EPA approved water quality standards and have provided EPA with a 401 certification that the reissued permit is in compliance with their respective Water Quality Standards.

COMMENTS: Sampling Point Objection

Fourth, Commenters object to EPA's allowance to Peabody in the proposed permit to collect discharges resulting from precipitation events "from a sampling point representative of the type of discharge, rather than from each point of discharge." At a minimum, Peabody should be required to "show cause" for each instance where a use of a "representative sampling point" was necessary.

RESPONSE The reissued permit contains effluent limitations and monitoring requirements for over 100 Outfalls located on a lease area that is over 60,000 acres. The permit establishes effluent limitations and monitoring requirements for stormwater runoff associated with three different subcategories (alkaline mine drainage, western alkaline mine drainage, and coal preparation areas). EPA has concluded that the drainage area for each of the subcategories has similar characteristics and that the treatment in surface impoundment ponds achieves similar results for the associated Outfalls. Therefore, EPA has concluded it is reasonable to establish monitoring for representative sampling points

where the outfalls are substantially similar, especially considering the impracticability of conducting monitoring at all Outfall locations within the timespan of a given precipitation event. EPA has established a restriction that at least 20% of the discharges must be sampled. Monitoring of representative outfalls is provided for in the Clean Water Act: “When an applicant has two or more outfalls with substantially similar effluents, the Director may allow the applicant to test only one outfall and report that the quantitative data also apply to the substantially similar outfalls.” [40 CFR 122.21(g)(7)].

COMMENT: Missing Stormwater Discharge Plan

Fifth, Peabody’s application does not contain a stormwater discharge plan. It is not clear whether such a plan is needed or whether stormwater issues are addressed in the Sediment Control Plan.

RESPONSE: There is no requirement for a “stormwater discharge plan” in the Permit. The permit contains numeric effluent limitations for the control of stormwater generated at the mine site in accordance with the effluent limitations, guidelines and standards for the Coal Mining Point Source Category (40 CFR Part 434) for discharges of drainage from areas of Alkaline Mine Drainage, Coal Preparation Areas, and Western Alkaline Reclamation. The Permit also contains a requirement for a “Sediment Control Plan”, a “Seep Management and Monitoring Plan”, as well as a “Quality Assurance/Quality Compliance Plan”. EPA does not believe any additional stormwater plans are necessary to further control discharges of stormwater.

COMMENT: Failure to Consult under the Endangered Species Act

Last, EPA has failed to consult with U.S. Fish and Wildlife Service. Section 7(a)(2) of the Endangered Species Act (“ESA”) states that each Federal agency shall, in consultation with the Secretary, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. §1536(a)(2). In fulfilling these requirements, each agency is to use the best scientific and commercial data available. *Id.* This section of the ESA sets out the consultation process, which is further implemented by regulation, 50 C.F.R. §402. The Administrative Record indicates that this process has not been followed.

RESPONSE As stated in the Fact Sheet, EPA has determined that discharges in compliance with this permit will have no effect on threatened or endangered species. When a “no effect” determination is made, no consultation is required. EPA’s conclusion of no effect is consistent with the determinations made in previous permit reissuances for the PWCC, and no significant changes in facility operations or endangered and threatened species inhabiting the area have occurred. However, a copy of the permit and fact sheet was sent to the U.S. Fish and Wildlife Service for review and comment during the public comment period. No comments were received from U.S. Fish and Wildlife Service. The commenter has not raised an issue with the facts of this conclusion, and has not provided comment that any endangered or threaten species may be affected by this action. EPA has added to the Administrative Record a copy of the documentation on the list of potentially affected Endangered and Threatened Species that was not previously included in the record for this reissuance.

COMMENT: Conclusion

The proposed NPDES permit for Peabody is wholly deficient and requires significant investment of agency resources to become workable. Peabody has been given a free-pass to pollute with impunity. This situation is untenable and needs to be immediately corrected.

RESPONSE EPA does not agree the permit is deficient. The permit establishes effluent limitations, monitoring conditions, and special conditions consistent with the effluent limitation guidelines for the Coal Mining Point Source Category (40 CFR Part 434) and consistent with the water quality standards established by the Navajo Nation and the Hopi Tribe for the protection of water quality. The permit establishes a special condition to monitor, characterize, and report conditions to address seeps located at the toe of pond impoundments.